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No. 91-522

IN THE

Supreme Court of the United States

October Term, 1991

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC

Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Everett C. Johnson, Jr.
(Counsel of Record)
Philip L. Gordon
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200

Marc Cooper
Cooper, Wolfe & Bolotin, P.A.
Suite 700 Courthouse Tower
44 West Flagler Street
Miami, FL 33130
(305) 371-1597

Counsel for Petitioners

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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In their opposition to the Petition for a Writ of Certiorari, Respondents raise two novel arguments.[1] First, they contend that their case against Saudi Arabia, alleging unlawful arrest, imprisonment, and torture, does not involve the exercise of the police power.[2] Second, they contend that the United States deliberately misrepresented its view of this case to the Eleventh Circuit as a political favor to Saudi

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[1]For the statement required under Rule 29.1 of the Rules of this Court, see the Petition for a Writ of Certiorari at 1 n.1.

[2]Respondents also contend, for the first time, that "an element of [Respondent Nelson's] cause of action is the employment contract he signed in the United States." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 7. Respondents apparently misconstrue the meaning of the term "element". Neither the district court nor the court of appeals found that the employment contract was an element of any of Respondents' causes of action.

Arabia.[3] Both contentions are incorrect. More importantly, both contentions only underscore the need for this Court to issue a writ of certiorari in this case.

I. RESPONDENTS' CONTENTION THAT THIS CASE DOES NOT IMPLICATE THE EXERCISE OF POLICE POWER BY A FOREIGN STATE IS FRIVOLOUS

Respondents contend that this case does not present the question whether United States courts can exercise jurisdiction over claims arising from the exercise of the police power by a foreign state in its own territory. According to Respondents, "[n]either side ever alleged any facts pertaining to the 'exercise of police power'." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 2 [hereinafter Opposition Brief]. Respondents also contend that discovery is necessary to determine whether this case actually implicates Saudi Arabia's exercise of police power. *Id.* Both contentions are meritless.

A. Respondents Specifically Allege an Abuse of the Police Power by Saudi Arabia

Respondents' Complaint alone belies their contention that "[n]either side ever alleged any facts pertaining to 'exercise

[3]Respondents also contend that this case does not create a conflict among the circuits but instead is a "wholly unremarkable part of th[e] consistent federal jurisprudence" interpreting the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1988), as applied to extraterritorial torts. Opposition Brief at 13. Respondents incorrectly portray the Eleventh Circuit's precedent-setting decision. One commentator has written, "With respect to claims relating to arrest and detention, the *Nelson* opinion is notable in that it permits the assertion of jurisdiction against a foreign state regarding the exercise of its police powers." Vega, *Nelson v. Saudi Arabia*, 85 Am. J. Int'l Law 557, 558 (1991) (footnote omitted).

of police power'."[4] Opposition Brief at 2. Indeed, the Complaint turns on frequent allegations of improper exercise of the police power. The first substantive allegation in the Complaint states that Scott Nelson was taken to a "jail cell" and "beaten by agents or employees of Saudi Arabia; *acting in their official capacity.*" Complaint at ¶ 11 (emphasis added). It then alleges that during his captivity, Respondent "was repeatedly interrogated, in Arabic, by *police investigators.*" *Id.* at ¶ 12 (emphasis added). Count II alleges battery by Saudi Arabia, "through its agents or employees, *acting in their official capacity.*" *Id.* at ¶ 18 (emphasis added). Count IV of the Complaint alleges "Wrongful Arrest and Imprisonment". *Id.* at 6. Count V apparently alleges a breach of the United Nations Code of Conduct for *Law Enforcement Officials*. *Id.* at ¶ 26 (emphasis added). Finally, Respondents' claim of negligent failure to warn alleges that Saudi Arabia "knew or should have known that officials of the Saudi government . . . have, and sometime exercise, the power to have persons summarily arrested." *Id.* at ¶ 15. Each of these allegations starkly contradicts Respondents' contention that the exercise of the police power is not in the record.

In addition, sworn affidavits of Respondents Scott and Vivian Nelson alleging the improper exercise of police power were submitted to the district court in support of Petitioners'

[4]Respondent's assert that "the only document in the case is the Respondents' Complaint filed in district court." Opposition Brief at 1-2. While the Complaint alone is sufficient, this assertion misrepresents the record in this case, which includes numerous pleadings filed before the district court by both parties. Respondents also miss the irony of their discussion of the record when Respondents' entire Argument V (relating to the United States' position) relies upon materials not in the record.

motion to dismiss.[5] In her affidavit, Respondent Vivian Nelson alleged that Respondent Scott Nelson "was arrested and jailed in Riyadh, Saudi Arabia without charges or explanation." Affidavit of Vivian Nelson at 1 (Oct. 27, 1986), ***reprinted in Hearing, supra*** note 5, at 24. Respondent Scott Nelson alleged in his affidavit that he "was . . . taken to the Criminal Investigation Division (C.I.D.)." Affidavit of Scott J. Nelson at 2 (Nov. 18, 1986), ***reprinted in Hearing, supra*** note 5, at 26. After referring several times to "my arrest", Respondent Scott Nelson then stated that he "was transported to Al Sijan Prison to await trial on unknown charges." *Id.* at 3, ***Hearing, supra*** note 5, at 27. Respondents' own sworn statements, therefore, implicate Saudi Arabia's exercise of the police power in this case.

Even in the Opposition to Petition for Writ of Certiorari, Respondents contradict their assertion that the exercise of the police power is not at issue in this case. In summarizing the findings of the Eleventh Circuit, based on the allegations of the Complaint, Respondents state that Respondent Scott Nelson's " 'blowing the whistle' embarrassed his superiors at King Faisal Specialist Hospital, who procured his physical torture at the hands of *government agents or officials acting* contrary to law but ***under color of law***." Opposition Brief at 7 (emphasis added).

This case rests entirely upon Respondents' allegations that Saudi officials abused the police power. The record belies Respondents' contention that there is no issue of the exercise of police power. Indeed, it leads only to the opposite

[5]Respondents originally submitted these affidavits as prepared statements for a congressional hearing. *See Problems Confronting American Businessmen in Saudi Arabia: Hearing Before the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 24-29 (1987) [hereinafter *Hearing*].

conclusion, that the power of United States courts to assert jurisdiction over claims arising from the exercise of the police power by a foreign state in its own territory is the central issue in this case.

B. No Discovery Is Necessary Before a Final Adjudication of Petitioners' Claim of Immunity

Respondents contend that Petitioners' claim of foreign sovereign immunity cannot be finally adjudicated until after Petitioners have "discharged the burden" of participating in discovery and of raising the immunity defense in an answer to the Complaint. Opposition Brief at 2. This contention flies in the face of the Federal Rules of Civil Procedure and ignores the decisions of this Court and of several Courts of Appeal. Consequently, it does not even warrant consideration by this Court.

Federal Rule of Civil Procedure 12(b) explicitly permits a defendant to raise the defense of lack of subject-matter jurisdiction before serving a responsive pleading. Fed. R. Civ. P. 12(b); *Blackmar v. Guerre*, 342 U.S. 512, 514 (1952) (defendant "properly presented" defense of lack of jurisdiction first in a motion to dismiss and then, after the motion was overruled, as a defense in the answer). Without citing any authority, Respondents assert that Petitioners must raise this defense in an answer. Opposition Brief at 2. No court anywhere has ever so held, and the Federal Rules of Civil Procedure impose no such burden. This argument should be summarily rejected.

Respondents also contend, again without citing any authority, that before raising the defense of foreign sovereign immunity, Petitioners must participate in discovery. *Id.* The collateral order doctrine, however, as this Court has held, permits

review of interlocutory orders denying claims of immunity because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *cf. Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) ("[t]he immunity question is a pure issue of law, appropriate for our immediate resolution").

Segni v. Commercial Office of Spain, 816 F.2d 344 (7th Cir. 1987) is the seminal case extending the collateral order doctrine to an interlocutory order denying a claim of foreign sovereign immunity. The *Segni* court held that a "foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity." *Id.* at 347. Similarly, the court in *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989), concluded that claims of foreign sovereign immunity fall within the collateral order exception because "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." Five other circuits have reached the same conclusion. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990), and cases cited therein. The collateral order doctrine, therefore, confers jurisdiction on this Court to review the Eleventh Circuit's denial of Petitioners' motion to dismiss for lack of subject-matter jurisdiction before Petitioners have participated in any discovery.

In sum, this Court should reject both of Respondents' contentions. First, the collateral order doctrine, as promulgated by this Court and interpreted by numerous Courts of Appeal, does not require a party claiming immunity to participate in

discovery before a final adjudication of an immunity claim. Second, issues relating to the exercise of the police power are squarely in the record. Respondents themselves raised them in the Complaint. Their eleventh-hour attempt to disassociate themselves from the allegations of the Complaint must fail.

II. RESPONDENTS' CONTENTION THAT THE UNITED STATES HAS PURPOSEFULLY MISREPRESENTED ITS POSITION BEFORE THE ELEVENTH CIRCUIT FURTHER ILLUSTRATES THE NEED FOR REVIEW

Respondents accuse Petitioners of misrepresenting the present position of the United States in this case. To support this accusation, they cite the United States' failure to "join"[6] the Petition for a Writ of Certiorari. Opposition Brief at 14. They also assert that the position of the United States in its Statement of Interest "was a short-term political accommodation" to Saudi Arabia. *Id.* at 17. In essence, Respondents suggest that the United States purposefully misrepresented its position before the Eleventh Circuit as a political favor to Saudi Arabia. Respondents then conclude that as a result, this case implicates only "transitory" foreign policy interests. *Id.* Respondents' contentions are without support. Indeed, these arguments only reinforce Petitioners' assertion that this case implicates important foreign policy issues.

A. The United States Did Not Misrepresent Its Position to the Eleventh Circuit

Respondents contend that the Statement of Interest filed by the United States in the Eleventh Circuit does not express the position of the United States in this case. They reason

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[6]Respondents apparently ignore Rule 12.2 of this Court which permits only parties to join in a petition for a writ of certiorari.

that "the United States cannot claim an objective legal interest in having the *Nelson* case reversed at the same time that it is sincerely attempting to use the good offices of the Department of State to effectuate a settlement." *Id.* at 16-17. The position of the United States in the Statement of Interest, however, is perfectly consistent with its support for a resolution of this case outside of United States courts.

Although the United States contended in its Statement of Interest that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602-1611 (1988), prohibits United States courts from adjudicating Respondents' claims, it did not contend that Respondents must go without a remedy if their claims prove meritorious. Indeed, the United States informed the Eleventh Circuit that "[w]e have attempted to assure that the plaintiffs will have an appropriate forum in which to present their claims." Petition for a Writ of Certiorari at 38a. The actions of the United States, therefore, are unified by a single principle that has been Petitioners' position throughout this litigation: United States courts are not the appropriate forum for resolving claims arising from the public acts of a foreign state. By offering diplomatic channels to discuss this dispute, the United States has acted consistently with its position before the Eleventh Circuit.

B. Respondents' Opposition Demonstrates That This Case Implicates Important Foreign Policy Issues

Respondents attempt to minimize the foreign policy interest of the United States in this case by characterizing it as "a transitory political response to the request by the Kingdom of Saudi Arabia for help in fighting its lawsuits." Opposition Brief at 17 (footnote omitted). To support this characterization, Respondents refer to diplomatic correspondence between the

Kindgom of Saudi Arabia and the United States government shortly before the filing of the Statement of Interest. Respondents submit a portion of this correspondence[7] in their Appendix.[8] Contrary to Respondents' assertion, this correspondence demonstrates the important foreign policy implications for the United States of this case.

Respondents rely on only two epistles in contending that this case involves only "transitory" foreign policy interests: first, a letter from the Royal Ambassador of the Kingdom of Saudi Arabia to the United States Secretary of State, which Respondents have never seen; and second, a response from the Legal Adviser of the State Department to the Royal Ambassador. This correspondence between officials at the highest level of the Saudi and United States governments illustrates that this case has substantial import for the foreign relations of the United States. Indeed, Respondents admit as much by citing the Legal Adviser's offer in his response of "the 'good offices' of the Department of State to promote a settlement between the parties." *Id.* at 15. As Respondents explain, "[t]he 'good offices' of the Department of State is a classic institution in international law, to be accorded *the*

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[7]Respondents insinuate that Petitioner Saudi Arabia has acted improperly by refusing to disclose a letter from the Royal Ambassador of the Kingdom of Saudi Arabia to the United States Secretary of State. International convention, however, establishes the inviolability of the official correspondence of diplomatic missions, regardless of a foreign state's immunity from suit in United States courts. *See* Vienna Convention on Diplomatic Relations, *opened for signature* April 18, 1961, art. XXVII, 29 U.S.T. 3229, 3239, T.I.A.S. No. 7502 (ratification by U.S. submitted to U.N. Secretary General Nov. 13, 1972) (guaranteeing the inviolability of official correspondence relating to the functioning of foreign missions).

[8]None of the materials submitted to this Court in the Appendix was part of the record before the district court. Respondents submitted these materials to the Eleventh Circuit only after Petitioners filed their Petition for Rehearing and Suggestion of Rehearing En Banc.

highest diplomatic status as an official representation of the nation." *Id.* (emphasis added).

In sum, Respondents' own submissions to this Court include correspondence at the highest level of the United States government concerning this case and an offer of a forum for settlement "to be accorded the highest diplomatic status". Despite Respondents' attempt to minimize the foreign policy implications of this case, their own submissions demonstrate that, as the United States said in its Statement of Interest, this case implicates significant foreign policy concerns of the United States and, therefore, merits review by this Court.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Everett C. Johnson, Jr.
(Counsel of Record)
Philip L. Gordon
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200

Marc Cooper
Cooper, Wolfe & Bolotin, P.A.
Suite 700 Courthouse Tower
44 West Flagler Street
Miami, FL 33130
(305) 371-1597